Marshall —
See the attached entertainment article. What do you think?

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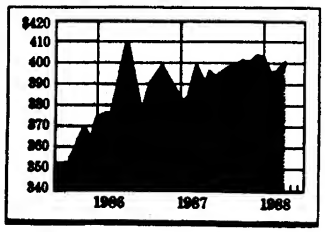
TUESDAY, MAY 10, 1988

Construction Spending

In billions of dollars, seasonally adjusted.



SPENDING for construction rose in March to a seasonally adjusted annual rate of $401.8 billion from a revised $396 billion in February, the Commerce Department reports.

To Read This Story In Full, Don't Forget To See the Footnotes

* * *

It's Trying to Seem Erudite, Just Like Law Reviews; Record 3,917 Ibid.s, Infra.s

By PAUL M. BARRETT
Staff Reporter of THE WALL STREET JOURNAL

For generations, American law professors have feared discovery of an embarrassing secret: Most law-review literature isn't scholarly at all, but merely academic-sounding surveys of court opinions and statutes.

In a famous 1936 self-indictment, a Yale University law professor named Fred Rodell wrote: "There are two things wrong with almost all legal writing. One is style. The other is content."

Now, a growing number of academics are confessing publicly to one of Prof. Rodell's main charges. They admit being obsessed with footnotes.[1]

Open almost any law review and you'll find yourself buried in a jumble of *Ibid.s* and *infra.s*, microscopic qualifications and cryptic cross-references. Footnote sprawl is so bad that it frequently *becomes* the page, leaving only a few lines of text jammed in at the top.

Excuse for Obscurity

Prof. John E. Nowak of the University of Illinois says footnotes are "an excuse to let the law-review writer be obscure and befuddled." So great is the alarm in some quarters that a new brand of literature has sprung up in which law professors bemoan their pedantic ways. "A chorus of critics," says Prof. Arthur D. Austin of Case Western Reserve University, "argues that footnotes have become a serious embarrassment to legal scholarship and one of the main culprits in the death of decent writing in law reviews."

Fred R. Shapiro, a law librarian at Yale, tracks the footnote furor as a kind of a hobby. His research reveals that the Georgetown Law Journal holds the overall record of 3,917 footnotes in a 1987 survey of criminal procedure written by the review's staff. The individual champ is Jesse H. Choper, the dean of the University of California's law school at Berkeley, who weighed in with 1,611 footnotes in a recent article on the Supreme Court.[2]

The footnote habit has "spread like a fungus" through all legal writing and has "deadly serious" implications, complains Judge Abner J. Mikva of the U.S. Court of Appeals in Washington, D.C. Judges, who routinely cite law-review articles as authority, have themselves fallen victim to the infection.

Malleable Material

Some judicial opinions are so bogged down in footnotes and so confusing that lawyers can later bend them to fit any number of conflicting assertions, Judge Mikva says. "It makes the law flabby," he adds. "It makes it too easy [for lawyers and judges] to use the 'on the other hand' arguments." To dramatize his concern, Judge Mikva has gone cold turkey.[3]

Dubious erudition is the theme that runs through much of the footnote excess. Aspiring to library macho, legal scholars decorate their prose with exotic discoveries—what Prof. Austin calls "fugitive sources." Quoting from judges' personal letters or obscure trial transcripts, for example, is thought to win an author respect as "a ferocious archaeologist," he says. A snippet from the Nixon White House tapes on the former president's opposition to antitrust enforcement is also deemed impressive.

Among left-leaning professors, it is fashionable to begin articles with voluminous references to French literary deconstructionism and neo-Marxist philosophy. Professors influenced by the University of Chicago's free marketeers prefer to prove their points with reams of mysterious econometric formulae.

A lawyer once tried to hire him, Prof. Austin says, after reading one of his articles "full of incomprehensible footnotes." Recalls the professor: "I was the right person to confuse his opponents."

Some footnoting, impossible to categorize, may best be understood as exercises in creative irrelevance.

A recent Cornell Law Review article on "Legislation, Adjudication and Implied Private Actions in the State and Federal Courts" mentioned a case involving the Goodyear Blimp. Inspired by his unusual subject, the author digressed to inform readers that "the Blimp is shaped like a football" and that for further discussion of "the aerodynamics of oblate spheroids," one could refer to R. Von Mises's "Theory of Flight," page 102.[4]

Inferiority Complexes

Several things contribute to footnote overkill. Probably topping the list is law professors' inferiority complex. Most legal scholars lack graduate training beyond law school, which emphasizes preparation for the trade more than traditional research.

"The historians doubt their seriousness, the social scientists doubt their rigor," says Robert Stevens, the chancellor of the University of California at Santa Cruz and a former professor at Yale Law School. "Footnoteitis," he explains, is a defensive response, a grab for respectability.

Some tenure committees exacerbate the problem by confusing heft with quality. Prof. Nowak recalls as a young teacher receiving this advice from a kindly mentor: "Take an obscure little problem that no one has thought much about, blow it out of all proportion, and solve it, preferably several times, in prestigious law reviews."

Law reviews also nurture the footnote. Unlike most scholars, law professors publish most of their work in journals edited by students and not refereed by outside experts. Historically, the paradox of trainees coaching veterans has been overshadowed by celebration of review editorship as a teaching tool and rite of passage.

Habits Into Rules

The result, however, is that neophytes convert the bad habits of their elders into rigid rules. No proposition sees print without a little number next to it. Mr. Stevens describes writing about a Connecticut statute and receiving an edited version with footnotes admonishing " 'and see [the laws of] Alabama, Arkansas, California, Delaware' and so on. They want[ed] every statute in the country. . . . It's kind of a Parris Island Boot Camp mentality."

Past and present law-review editors admit complicity but defend their approach as a bulwark against unsubstantiated arguments. "We challenge the author to support his assertions with actual law," says Philip Sechler, the editor of the title-holding Georgetown journal.

But he does concede that "it would take an awfully long time to read" a typical article with all its footnotes.[5]

[1] In pursuit of vivid footnote imagery, one would have difficulty surpassing Noel Coward: "Encountering [a footnote] is like going downstairs to answer the doorbell while making love."

[2] Mr. Choper, a reluctant title-holder, argues, "The numbers aren't very pertinent; it's the quality." Anyway, he says, he "could have had 300 more footnotes" if he hadn't shown restraint.

[3] i.e., he has eliminated footnotes from his opinions.

[4] The critics themselves aren't immune to flights of fancy. Prof. Austin, in his critique of obsessive footnoting, describes the phenomenon of professors "airing it out for numbers"—going for broke and throwing in every imaginable citation. In a footnote of his own, Prof. Austin explains that the term derives from the football colloquialism for a long pass and that he has discussed the matter personally with Bernie Kosar, a Cleveland Browns quarterback.

[5] Mr. Sechler adds: "I concentrate on the text."

Sterling Electronics Acquisition

HOUSTON—Sterling Electronics Corp. said it completed the previously announced acquisition of Minneapolis-based Industrial Components Inc. in a transaction involving a combination of notes, cash, stock and liability assumption. Industrial Components, a maker of electronic parts, becomes a division of Sterling, with current management retained.